

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

DANIEL BERRY,

Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner of  
Social Security,

Defendant.

CASE NO. C08-5149RBL

ORDER

THIS MATTER comes on before this Court upon Plaintiff's Application for an Award of Attorney's Fees and Expenses pursuant to the Equal Access to Justice Act, 18 U.S.C. § 2412 [Dkt. #41]. Having considered the records and file herein, the Court finds and rules as follows:

**PROCEDURAL HISTORY**

The underlying case involves plaintiff's request for judicial review, pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3), of the Commissioner's final decision finding him not disabled under the Social Security Act. On February 20, 2009, this Court (Honorable Franklin D. Burgess) adopted the Magistrate Judge's Report and Recommendation and affirmed the ALJ's decision that plaintiff was not disabled. [Dkt. #28]. On September 22, 2009, the Ninth Circuit reversed and remanded for further proceedings holding that the ALJ and this Court erred in finding the

1 plaintiff not disabled. *Berry v. Astrue*, 622 F.3d 1228 (9<sup>th</sup> Cir. 2010). Plaintiff's Application for  
 2 Attorney's Fees and Costs in the amount of \$16,586.19 followed.

### 3 DISCUSSION

4 The Ninth Circuit reversal renders plaintiff the prevailing party in this case. *Shalala v.*  
 5 *Schaefer*, 509 U.S. 292, 299-302 (1993); *Akopyan v. Barnhart*, 296 F.3d 852, 854 (9<sup>th</sup> Cir. 2002).  
 6 The Court should deny EAJA fees whenever the Commissioner's position was substantially  
 7 justified. *Lewis v. Barnhart*, 281 F.3d 1081, 1083 (9<sup>th</sup> Cir. 2002). The government has the  
 8 burden to show that its conduct was substantially justified at each stage of the proceedings.  
 9 *Gonzalez v. Free Speech Coalition*, 408 F.3d 613, 618 (9<sup>th</sup> Cir. 2005). The Commissioner's  
 10 position is substantially justified when it is justified to a degree that could satisfy a reasonable  
 11 person that it has a reasonable basis in law and fact. *Lewis*, 281 F.3d at 1083. The government's  
 12 position is likewise substantially justified if there is a "genuine dispute" over which "reasonable  
 13 people could differ." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). A substantially justified  
 14 position is one that "a reasonable person could think as correct, that is, if it has a reasonable basis  
 15 in law and fact." *Pierce*, 487 U.S. at 566, n.2. The position does not need to be "justified to a  
 16 high degree." *Id.* at 565. The standard is satisfied if there is a "genuine dispute." *Id.*

17 The government must justify the original agency action and the later positions taken in  
 18 litigation. The reviewing court must ascertain "first, whether the government was substantially  
 19 justified in taking its original action; and second, whether the government was substantially  
 20 justified in defending the validity of the action in court." *Kali v. Bowen*, 854 F.2d 329, 332 (9<sup>th</sup>  
 21 Cir. 1988). In the case at bar, the Commissioner's position was substantially justified.

22 The ALJ and this Court concluded that the SSA regulations required finding plaintiff not  
 23 disabled. We both decided that he retained the "residual functional capacity" to do his "past  
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1 relevant work” as a courier driver. *See* 20 CFR § 404.1520. Because plaintiff had the physical  
2 and mental capacity to be a courier driver, we reasoned that the mere fact that he could not pass a  
3 drug test (a requirement for a Commercial Driver’s License) because of his prescription pain  
4 medications did not render him disabled. He was not disabled, in our view, because passing a  
5 drug test and obtaining a CDL was a hiring requirement, and unrelated to physical or mental  
6 capacity to do the job, and explicitly excluded by the SSA. 42 U.S.C. § 423(d)(2)(A) (a  
7 claimant’s disability is determined “regardless of . . . whether he would be hired if he applied for  
8 work.”)

9 The Ninth Circuit disagreed and ruled that “[a] mandatory requirement that employers  
10 cannot hire people with a certain level of pain medication in their blood is in essence a physical  
11 demand of their job.” *Berry*, 622 F.3d at 1232.

12 The Commissioner’s position had a “reasonable basis in the law.” *Pierce*, 487 U.S. at  
13 566, n.2. He relied on the statutes and regulations at issue. He also relied on case law  
14 interpreting them. *See, Quang Van Han v. Bowen*, 882 F.2d 1453, 1457 (9<sup>th</sup> Cir. 1989)  
15 (interpreting the Act and Ruling 82-40 to conclude that if a claimant can still perform his past  
16 relevant work, he is not disabled even if that work does not exist in the United States.) The fact  
17 that the Ninth Circuit reversed the decision of the Court and rejected the Commissioner’s  
18 position does not mean that the position was not substantially justified. *Pierce*, 487 U.S.  
19 at 566, n.2.

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